

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO INIQUEZ,

Defendant and Appellant.

B216516

(Los Angeles County

Super. Ct. No. MA041780)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hayden Zacky, Judge. Affirmed.

Nancy Mazza for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Sergio Iniquez guilty of the first degree murder of Alipio Ruiz and found true the enhancement allegations that he used a firearm, intentionally discharged a firearm, and intentionally discharged a firearm proximately causing great bodily injury and death. Additionally, the jury found true the special allegation that Iniquez committed these offenses for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members.

Iniquez challenges the admissibility of evidence on several grounds and contends substantial evidence did not support the verdict and the gang enhancement finding. We affirm.

BACKGROUND

On the morning of March 24, 2008, Jovani Guillen, Thomas Reyes, Francisco Ruiz, Miguel Ruiz, and Alipio Ruiz gathered at the Ruiz brothers' house. Francisco and Reyes were members of the 13 Kings gang; Miguel and Guillen belonged to other gangs. Alipio was not a gang member. The gathering was friendly.

Defendant, driving a black Chevrolet Tahoe SUV with chrome rims, pulled up outside the Ruiz house. When Guillen walked up to the vehicle, defendant asked if he belonged to a gang. Guillen told defendant he was a member of the Pacoima Project Boys and called Miguel over to the Tahoe. Defendant asked Miguel, "Is there anyone here from Palmas?" Knowing that Palmas was another name for 13 Kings, Miguel called Reyes over, believing the driver was looking for him. After a brief conversation with Reyes, defendant drew a semi-automatic pistol and fired one shot, killing Alipio.

Police were unable to find either a shell casing or bullet fragments.

Three days after the shooting, police showed the surviving Ruiz brothers and Reyes a six-pack of photos that included a picture of defendant and another six-pack containing a picture of defendant's brother, Eduardo Iniquez. Reyes identified defendant as the shooter. Francisco Ruiz failed to identify defendant from the six-pack of photos

but picked Eduardo out of the second six-pack and told police Eduardo's brother Sergio was the shooter. Miguel Ruiz failed to identify anyone.

A week later, police searched defendant's and Eduardo's houses, recovering from defendant's house the registration for a 2001 Chevrolet in defendant's name and a box of .357-caliber ammunition with 18 missing cartridges, but no .357-caliber pistol.

At Eduardo's house, police found an unsent letter written by Eduardo to a fellow 13 King, Rafael "Gadget" Fermin, who was imprisoned in Mississippi. In the letter, Eduardo revealed deep frustration with "Lucky," "Drifter," and other younger members of the 13 Kings. He wrote, "Hey, the hood is doing bad. Lucky and Drifter fucked the hood up They's lame. All of them. They can't even keep up with me and my brother." He continued, "That's sad. But fuck them fools. They fucked up dumping at me." Eduardo wrote, "I'm going to war when bitch ass Lucky gets out. Or Drifter. Hey, these niggas don't want none no more, but I do. Fuck peace. That it will never be. Not until there is one put away." The word "Lucky" was crossed out—a sign that he was targeted for killing.

Detective Robert Gillis, the prosecution's gang expert, testified Lucky was suspected of having shot at defendant's house on a prior occasion. Gillis interpreted the letter as Eduardo accusing younger 13 Kings members of shooting at his house and committing a number of transgressions, for example failing to sell drugs, earn money, or retaliate against rivals, unlike Eduardo and defendant (who was not a 13 Kings member). Gillis opined that Eduardo was declaring there would be no peace until one of his rivals within the 13 Kings was dead.

While police searched their houses, Eduardo and defendant were placed in a police van equipped with a recording device, allowing police to listen in on any conversation. The brothers discussed ways to coordinate their stories and conceal evidence. Eduardo told defendant he had to "get rid of the rims," to which defendant replied, "I sold them already dude." Defendant berated Eduardo for having written the letter to Fermin, telling him, "You are fuckin' stupid. You're fuckin' dumb, fool. Don't ever write information like that to anybody." He said, "Now they know they had a little conflict. That right

there makes it seem there's a conflict goin' on. . . . [T]hat's probable cause for a murder." The brothers speculated about how to minimize the import of the letter.

At trial, Francisco Ruiz and Detective Gillis testified Eduardo Iniquez was a member of 13 Kings. A rift arose in 13 Kings between Eduardo and others over Eduardo's possession of a gun claimed by Drifter and the firing of shots at Eduardo's house (where defendant lived at the time) by assailants rumored to be Francisco Ruiz, Drifter and Lucky. Gillis described the divide in 13 Kings as forming between older members, like Eduardo and Fermin, and "the youngsters" (who included Francisco Ruiz) "that were pretty much the up and comers in the clique, called the crazy tinies clique" Francisco Ruiz confirmed the existence of the cliques. Gillis testified, "There were also some other incidents. . . . [¶] There had been a couple of murders that occurred where 13 Kings gang members were actually victims of murder, and paybacks were not done. And there was some internal struggle[] over that, of what certain sides thought should have been done at the time."

Gillis analyzed the Eduardo-Fermin letter and concluded it was consistent with Eduardo planning to kill or have killed one of his younger rivals. He testified it is not uncommon to have rifts within a gang of such severity that a member of one clique will kill a member of another clique. Gillis opined that the assassination of a rival 13 Kings member by defendant would benefit the 13 Kings in several ways. Any 13 Kings member who learned about the shooting would recognize defendant as Eduardo's brother and know Eduardo was responsible. Younger members who deviated from gang rules would fear retaliation and consequently be more loyal. Other gang members across the city would fear the 13 Kings' ruthlessness.

The identification testimony was mixed. Francisco and Miguel Ruiz identified defendant as the shooter but Reyes, retracting his pre-trial identification of defendant, was not sure, and Guillen was positive defendant was not the shooter.

DISCUSSION

I. Foundation and Admissibility of Gang Evidence and Eduardo's Letter

The prosecution presented a theory of a gang-related shooting gone wrong, alleging defendant mistakenly killed Alipio Ruiz while attempting to kill Thomas Reyes. Defendant attempted the assassination on behalf of his brother, a well-known gang member involved in an internal gang conflict. Detective Gillis testified about these matters and analyzed street rumor, previous incidents of violence, and Eduardo's letter. Gillis' testimony established motive and intent for what otherwise would have been a random and motiveless crime, and was corroborated by outside evidence, including eyewitness testimony and audio recordings made by the police.

A. Foundation of Gang Expert Testimony

Defendant contends Gillis' testimony was based upon speculation and hearsay, particularly Eduardo's letter, and should have been excluded.

A witness testifying as an expert may offer an opinion "[b]ased on matter . . . perceived by or personally known to the witness or made known to him . . . whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801.) A gang expert may rely on any information obtained in conversations with gang members or through an investigation of gang-related crimes. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464-1466.)

Eduardo's letter supported Gillis' discussion of the conflict within the 13 Kings and provided a reason for Eduardo wanting to kill a member of his own gang. The court did not err in allowing Gillis to testify based upon his analysis of the letter.

B. Relevance of Gang Expert Testimony

Defendant contends Gillis' testimony was irrelevant because nothing indicated the shooting was gang-related. We disagree.

Trial courts may allow expert testimony of police officers or other gang experts if the evidence is relevant to prove malice, premeditation, intent, or motive on the part of a

defendant. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1517-1519.)

In the prosecution's theory, defendant shot the victim in an attempt to murder his brother's rival. Francisco Ruiz testified to an ongoing conflict within the 13 Kings. Eduardo's letter to Fermin included references to defendant's participation in gang activities. At the Ruiz house, defendant asked twice whether any member of the 13 Kings was present. These facts established a strong gang motive for defendant's attempted assassination of Thomas Reyes. Gillis' testimony was relevant to that motive.

C. Unduly Prejudicial Effect of Gang Evidence

Detective Gillis testified he had been involved in numerous investigations of shootings committed by 13 Kings members. He said the shootings were at times a weekly activity and testified Fermin (to whom Eduardo had written his letter) had shot a rival gang member in the back of the head and Eduardo himself had been convicted of committing a drive-by shooting of a rival (non-13 Kings) gang member's house. Defendant contends the court should have excluded Gillis' testimony about gang activity on the ground that its probative value was substantially outweighed by its undue prejudicial effect. We disagree.

Given its inflammatory impact, "[g]ang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) "Thus, as general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) But the trial court "must carefully scrutinize

gang-related evidence before admitting it because of its potentially inflammatory impact on the jury.” (*People v. Albarran*, *supra*, at p. 224.)

We review the trial court’s decision on whether evidence, including gang evidence, is relevant and not unduly prejudicial for abuse of discretion. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193.) “Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.)

Substantial evidence, including the testimony of Francisco Ruiz, the transcript of defendant’s conversation with Eduardo, and a letter written by Eduardo to an imprisoned 13 Kings member suggested defendant, for the benefit of the gang, conspired to kill one of his brother’s rivals within the gang. Gillis’ testimony about the membership and activities of the 13 Kings gang and its factions was thus directly relevant to the prosecution’s theory of the case and assisted the jury in understanding the 13 Kings gang culture and defendant’s motive. The prejudicial effect of the testimony was minimal. Francisco Ruiz testified the gang was involved with firearms and rumored to have committed at least one drive-by shooting, it was undisputed Fermin was already in prison, and Eduardo himself admitted in his letter to Fermin that he was “going to war” with fellow gang members and would not countenance peace. Gillis’ testimony that the gang in general and Fermin and Eduardo in particular were violent was merely cumulative. The trial court did not abuse its discretion in admitting it.

D. Hearsay Evidence

The trial court admitted Eduardo’s letter against defense objections that it was hearsay. Defendant asserts this was error.

Hearsay is inadmissible unless an exception exists. An out-of-court statement falls outside the hearsay rule if the statement was adopted by the party against whom it is offered. (Evid. Code, § 1221.) In the recorded conversation between Eduardo and defendant about the letter, in which Eduardo calls for an intra-gang conflict, defendant

characterized the letter as “probable cause for murder.” It is clear that defendant knew the incriminating contents of the letter and impliedly adopted its message.

An out-of-court statement is also admissible if made by a party to a conspiracy to commit a crime, either prior to or during the time the party participated in the conspiracy. (Evid. Code, § 1223; *People v. Earnest* (1975) 53 Cal.App.3d 734, 741.) The existence of a conspiracy need not be established “beyond a reasonable doubt or even by a preponderance of the evidence; only prima facie evidence of the fact is required.” (*Ibid.*)

Eduardo wrote to Fermin that other 13 Kings members could not “keep up with” him and defendant, meaning they did not participate in gang activity to the extent he and defendant did, and essentially declared war on the other members. Eduardo and defendant lived together in the house where the drive-by shooting by Francisco Ruiz was rumored to have occurred. Eduardo and defendant were recorded discussing the murder and planning how to coordinate their stories, conceal evidence, and spin Eduardo’s letter. Defendant drove to the Ruiz house and asked if any 13 Kings member was present before opening fire on people he apparently did not know. This constitutes prima facie evidence that the brothers conspired to assassinate Eduardo’s rivals within the 13 Kings and cover up their involvement. Eduardo’s letter was thus properly admitted.

E. Confrontation Right

Next, defendant contends Eduardo’s letter was a testimonial statement, and its admission denied him the Sixth Amendment right to confront the prosecution’s witnesses.

“The Sixth Amendment’s Confrontation Clause provides that, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’” (*Crawford v. Washington* (2004) 541 U.S. 36, 42.) Out-of-court testimonial statements by a witness who cannot be cross-examined cannot be used at trial to establish the truth of an asserted matter. (*Id.* at p. 59.) “‘Testimony’ . . . is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ [Citation.]” (*Id.* at p. 51.) A testimonial statement is one the declarant “‘would reasonably expect to be used prosecutorially,’” or a statement “‘made under

circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” (Id. at pp. 51-52.)

Eduardo’s letter was not a testimonial statement, as nothing suggests that when he wrote it he expected it to be available for use at a later trial. Admission of the letter therefore did not violate defendant’s confrontation right.

F. Profile Evidence

Defendant contends Gillis’ testimony constituted improper profile evidence that permitted the jury to conclude that defendant was guilty because he behaved like a gang member. We disagree.

Profile evidence may not be used “to affirmatively prove a defendant’s guilt based on his match with the profile.” (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1086.) The jury may not be “invited to conclude that, because the defendant manifested some characteristics, he committed a crime.” (Id. at pp. 1086-1087.)

Gillis discussed the motivations of street gangs and the actions of the 13 Kings to establish background for the internecine dispute, not to establish a gang stereotype and condemn defendant for fitting it. His testimony did not constitute improper profile evidence.

II. Sufficiency of the Evidence

Defendant contends the identification and gang evidence was insufficient to support a guilty verdict or the finding on the gang enhancement.

When considering the sufficiency of evidence, “the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment.” (*People v. Romero* (2006) 140 Cal.App.4th 15, 18.) The judgment will be affirmed if supported by substantial evidence. Substantial evidence is that which is reasonable, credible, and of solid value. (Evid. Code, § 351; *People v. Bradford* (1997) 15 Cal.4th 1229, 1329.)

A. Identification Evidence

Defendant argues the identification evidence was unreliable due to inconsistencies between witnesses' statements to police and their testimony at trial. We disagree.

"Unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) As the finder of fact, the role of the jury is to determine who is telling the truth and which version of events to accept. (See *People v. Casey* (1926) 79 Cal.App. 295, 298-299; CALJIC No. 315.)

Three days after the shooting and again at trial, Francisco Ruiz identified defendant as the shooter. Miguel Ruiz failed to identify defendant shortly after the shooting but did so at trial. Reyes identified defendant after the shooting but would not do so at trial. Guillen was positive defendant was not the shooter. The jury apparently discredited Guillen's testimony and considered inconsistencies in Miguel's and Reyes's statements to be immaterial. It reasonably could do so. Francisco's and Miguel's testimony suffices to support the conviction.

B. Gang Enhancement Evidence

Finally, defendant argues insufficient evidence supported the finding that the shooting was committed for the benefit of a street gang. We disagree.

To support a finding that a defendant committed a crime for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members, evidence supporting "specific intent to *benefit* the gang is not required. What is required is the specific intent to promote, further, or assist in any criminal conduct by gang members." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198; Pen. Code, § 186.22, subd. (b)(1).)

Though defendant was not a member of any gang, his brother was. Eduardo was engaged in an internal conflict between the older members of the 13 Kings and the members of a clique that included Reyes and Francisco Ruiz. Should Reyes be killed, Eduardo stood to gain greater standing within 13 Kings, which would inspire greater fear both among their own members and outsiders. A letter written by Eduardo contained

death threats directed against his rivals within the 13 Kings gang. All of the eyewitnesses present at the scene recalled the shooter asking for members of the 13 Kings, and defendant held his fire until a 13 Kings member, Thomas Reyes, came within range. This evidence indicates defendant intended to shoot only at a member of the 13 Kings and supported the gang enhancement finding.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.